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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-943

THE CITIZENS ENVIRONMENTAL COUNCIL, OAK PARK HOMES ASSOCIATION, CRAIGMONT HOMES ASSOCIATION, ROBERT J. McELWAIN, PHILLIP L. CARR, et al.,

Petitioners,

vs.

JOHN VOLPE, WILLIAM D. RUCKELSHAUS, and ROBERT MORRISSEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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THE CITIZENS ENVIRONMENTAL COUNCIL, OAK PARK HOMES ASSOCIATION, CRAIGMONT HOMES ASSOCIATION, ROBERT J. McELWAIN, PHILLIP L. CARR, et al.,

Petitioners,

vs.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Citizens Environmental Council, et al., Petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on September 19, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 5 E.R.C. 1989 and a copy is attached hereto as Appendix A. A copy of the order of the Court of Appeals denying an

injunction pending appeal to that court, is attached hereto as Appendix B. The opinion of the District Court of Kansas is reported at 4 E.R.C. 1970, and a copy is attached hereto as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on September 19, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Is a general lack of detail in the environmental impact statement (EIS) prepared for the Switzer By-Pass project, particularly with reference to alternatives and both air and noise pollution, sufficient to raise a genuine issue of material fact as to the adequacy of the EIS, thereby precluding the granting of summary judgment in favor of the respondents?

2. Is the Federal Highway Administration and Department of Transportation's delegation of the preparation of the Switzer By-Pass EIS to the Kansas State Highway Commission, in violation of the National Environmental Policy Act of 1969, sufficient to raise a genuine issue of material fact, thereby precluding the granting of summary judgment in favor of the respondents?

STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

The pertinent provisions of the National Environmental Policy Act of 1969, 42 U.S.C. Sec. 4321 et seq., are

set out in Appendix D attached hereto. The pertinent provisions of Department of Transportation Policy and Procedure Memorandum 90-1 are set out in Appendix G attached hereto.

STATEMENT OF THE CASE

The northern portion of the proposed Switzer By-Pass involves the relocation of approximately 2.76 miles of U.S. Route 69 in the cities of Overland Park, and Lenexa, in Johnson County, Kansas. The project begins at the north edge of existing Interstate Highway 435, and the Switzer Road Interchange, and extends north and west to existing Interstate Highway 35. The project originated in 1959 in a Kansas City Metropolitan Area Origin and Destination Survey commissioned by the State Highway Commissions of Kansas and Missouri. The survey specifically considered population trends, population growth, passenger car registration and ownership, and labor force-employment in Johnson County, Kansas.

The corridor location was determined prior to the urbanization of this part of the Kansas City metropolitan area, but the record of the hearing conducted by the Kansas State Highway Commission on April 2, 1959, is replete with evidence that the area through which the proposed by-pass would travel was undergoing rapid development, both for residential and commercial uses. It was with the expectation that the selected corridor would eventually be densely populated that the location was chosen. On August 26, 1959, the Kansas State Highway Commission was notified by the Federal Highway Administration that the proposed by-pass had been approved for addition to the Federal-aid primary system. The state acquired right-of-way between March, 1962 and July, 1964, prior to the development of the

area, as a measure of reducing acquisition costs. The land acquired has remained under-developed.

On January 1, 1970, the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq., became effective. On November 30, 1970, the FHWA issued a draft Instructional Memorandum requiring preparation of an EIS for projects receiving design approval after February 1, 1971, and delegating responsibility for preparation of the EIS to the state highway departments. (This Instructional Memorandum was superceded by Department of Transportation Policy and Procedure Memorandum 90-1 (PPM 90-1) on August 27, 1971. With regard to the authorization of delegation of EIS preparation, the two regulations are substantially the same.)

A design hearing, considering the specific location, major design features, relocation, and the economic, social and environmental effects of the proposed by-pass, was held in Overland Park, Kansas, on April 23, 1971. The final EIS, which was prepared by the Kansas State Highway Commission, was accepted by the Federal Highway Administration on August 26, 1971. (The EIS is attached hereto as Appendix E.) Design approval for the project and authorization to complete plans, specifications and estimates were given on November 16, 1971. This suit was filed on November 23, 1971.

In substance, the amended complaint alleges that the EIS prepared by the Kansas State Highway Commission is inadequate because it fails to consider alternatives, or the effects of the by-pass on noise or air pollution. It also alleges the EIS is inadequate because it did not constitute an independent determination of the environmental effects of the proposed Switzer By-Pass by the Federal Highway Administration, a division of the Department of Transpor-

tation, the federal agency ultimately responsible for the project.

On May 4, 1972, Jerome Svore, Regional Administrator of the Environmental Protection Agency, commented in a letter to the Division Engineer of the Federal Highway Administration:

> Because of the lack of data on both air pollution and noise levels which will result from the project, it is impossible to determine the extent or impact of environmental damage. We suggest that data sufficient to make these determinations be compiled before construction is initiated.

The full text of Mr. Svore's letter is attached hereto as Appendix F.

Motions for summary judgment were made by Respondents, pursuant to Rule 56, F. R. Civ. Proc. After consideration of the pleadings, briefs filed by the parties and amici curiae, and supporting affidavits, the district court granted summary judgment for Respondents on January 3, 1973. Timely appeal was taken by the Petitioners, and on September 19, 1973, the United States Court of Appeals for the Tenth Circuit affirmed the judgment of the lower court.

REASONS FOR GRANTING THE WRIT

1. The General Lack of Detail in the EIS Prepared for the Switzer By-Pass Project, Particularly with Reference to Alternatives and Both Air and Noise Pollution, Is Sufficient to Raise a Genuine Issue of Material Fact As to the Adequacy of the EIS, and Thereby Precludes the Granting of Summary Judgment in Favor of the Respondents.

The National Environmental Policy Act of 1969[1] requires that a detailed statement of environmental impact be prepared for any "major Federal action significantly affecting the quality of the human environment."[2] The detailed statement, to be made by "the responsible Federal official," is to cover:

> (i) the environmental impact of the proposed action;
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;
>
> (iii) alternatives to the proposed action;
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[3]

Given the incredibly broad spectrum of federal agency activity which falls under the aegis of NEPA, the amount of detail required in any particular EIS must of necessity

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1. 42 U.S.C. Sec. 4321 et seq. (1970).
2. *Id.* at Sec. 4332(2)(C).
3. *Id.*

depend in large measure on the nature of the project itself. Although no rigid rules are possible of application or enforcement, the courts have developed fundamental principles to guide them, and as a result, there is a comparatively uniform approach to the question of "sufficient detail." That approach usually takes one of two forms.

The first is the view enunciated by Judge Eisele in the first Gillham Dam decision: NEPA requires the full disclosure of "all known possible environmental consequences."[4] The second, as suggested by Judge Keady in the Tennessee-Tombigbee Waterway decision, is to apply the more traditional "rule of reason" standard.[5] In reality, both approaches are very similar, differing only somewhat in degree rather than kind. As Judge Keady defined the necessary detail:

> . . . the EIS must be "marked by abundant detail or thoroughness in treating small items or parts"; . . . Thus, a Section 102 statement must thoroughly discuss the *significant* aspects of the *probable* environmental impact of the proposed agency action. By definition, this excludes the necessity for discussing either insignificant matters, such as those without import, or remote effects, such as mere possibilities unlikely to occur as a result of the proposed activities.[6]

Although Judge Eisele might perhaps require more delving into the lesser probabilities and possibilities than Judge Keady, both require a *thorough* report on the environmental consequences of the proposed action.

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4. *Environmental Defense Fund, Inc.* v. *Corps of Engineers of the United States Army*, 325 F. Supp. 749, 759 (E.D. Ark. 1971).

5. *Environmental Defense Fund, Inc.* v. *Corps of Engineers of the United States Army*, 348 F. Supp. 916, 932 (N.D. Miss. 1972).

6. *Id.*

This thoroughness must be evidence in the EIS in all of the six categories listed in NEPA, but particularly in the discussion of alternatives. The language of the Court of Appeals for the District of Columbia Circuit is representative of the general view:

> A sound construction of NEPA . . . requires a presentation of the environmental risks incident to reasonable alternative courses of action.
>
> . . .
>
> We reiterate that the discussion of environmental effects of alternatives need not be exhaustive. What is required is information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned. . . . (It is not) appropriate . . . to disregard alternatives merely because they do not offer a complete solution to the problem.[7]

As one commentator has recently suggested, two of the three key factors to be considered in determining the adequacy of an EIS are the amount of detail, i.e., "sufficient information to alert the decisionmakers to the most probable (or definite) environmental consequences of the (proposed) project" and a listing and evaluation of reasonable alternatives to the project.[8]

The application of these principles clearly demonstrates the inadequacy of the EIS prepared by the Kansas State Highway Commission for the Switzer By-Pass.

The By-Pass is an expensive project involving the construction of a major highway through a portion of Johnson County which is becoming urbanized at a rapidly in-

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7. *National Resources Defense Council, Inc.* v. *Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972).

8. Greis, *The Environmental Impact Statement: A Small Step Instead of a Giant Leap*, 5 URB. LAW. 264 (1973).

creasing rate. Yet while acknowledging that traffic demands in the area are now several times greater than the 1964 estimates,[9] nowhere does the EIS mention the effects of 51,602 vehicles per day[10] on ambient air quality. *The EIS does not once mention air pollution.* Nor is there an even remotely adequate discussion of the amount or effects of the noise which will be generated by this volume of traffic. The only references to noise are:

1. a suggestion that reduction in traffic on Metcalf Avenue, two miles east of Switzer Road, will decrease ambient noise;[11]
2. the statement that the increased traffic would "increase the noise level" but that an effort was made to reduce the noise by selecting a depressed main line design;[12]
3. a repetition of the preceding statement.[13]

With regard to alternatives, the EIS lists three which were "considered":

1. not constructing the project (developing existing routes);
2. closing parallel streets;
3. not allowing access to local cross streets.[14]

However, in the body of the EIS, the only "discussion" of these alternatives consists of a bare three paragraphs which simply state a conclusion such as:

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9. Appendix E at A33.
10. *Id.* at A32.
11. *Id.* at A34.
12. *Id.* at A35.
13. *Id.* at A37.
14. *Id.* at A35.

> Any plan which would not use the existent right of way would be inconsistent with commitments and planning which has been made in cooperation with local agencies, governmental units and the community.[15]

It is respectfully suggested to the Court that those three short paragraphs can by no stretch of the imagination be said to be an adequate discussion of even the three alternatives listed, much less any others, such as the development of mass transit. And in view of the energy crisis now facing this nation, it is mandatory that this project be re-evaluated, thoroughly and objectively, particularly when considered in relation to our dwindling energy resources and the need for alternative modes of transportation to the passenger car.

The function of an EIS is clearly to provide the agency decisionmaker with as complete information as possible about the environmental consequences of the proposed action, in order that the decisionmaker may consider this as one of the factors *before* making a final decision to modify, cancel, or proceed with the project. To use the EIS to justify a decision already reached is to pervert and distort the intent of Congress in enacting NEPA. Yet an examination of the phraseology of this EIS strongly suggests that rather than community desire being one factor in the objective evaluation of the Switzer By-Pass project, the EIS is an exercise in self-justification for the project.

For instance, the language quoted above suggests this view, as well as:

> Alternative routes, after years of development contemplating the construction of the project on existent

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15. *Id.* at A35.

> rights of way, are in conflict with existing and projected growth patterns.[16]
>
> Existing planned and controlled urban developments . . . and the continued *urban growth that has formed in the anticipation of the construction of this freeway* indicates an enhancement of the area of influence.[17] (emphasis added)

The total impression left by this EIS is that the only thing which is important about the Switzer By-Pass is that it be built along the previously planned route, and not that the fundamental policy of NEPA—the full, good-faith consideration of environmental effects *before* reaching a decision—is to be followed.

This is not to suggest that the work which has already gone into the project is not an important factor in the decisionmaking process:

> The Court . . . is suggesting that the degree of the completion of the work should not inhibit the objective and thorough evaluation of the environmental impact of the project as required by NEPA. . . . as the Court interprets NEPA, the Congress of the United States is intent upon requiring the agencies of the United States government . . . to objectively evaluate all of their projects, regardless of how much money has already been spent thereon and regardless of the degree of completion of the work.[18]

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16. *Id.* at A35.

17. *Id.* at A36.

18. *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, 325 F. Supp. 749, 756 (E.D. Ark. 1971).

The court goes on to say:

> The Court is of the opinion that the defendants may approach the problem of the ongoing project differently from a new project, but the end product should essentially be the same in both cases.[19]

In other words, the end result, whether for a new or an ongoing project should be an objective evaluation of environmental impact.

It is the belief of Petitioners that the lack of detail in the EIS, the failure to adequately discuss alternatives or noise pollution, and the failure to mention air pollution, are sufficient to raise genuine issues of material fact which warrant a full trial on the merits, rather than the granting of summary judgment for the Respondents.

2. The Federal Highway Administration and Department of Transportation's Delegation of the Preparation of the Switzer By-Pass EIS to the Kansas State Highway Commission, in Violation of the National Environmental Policy Act of 1969, Is Sufficient to Raise a Genuine Issue of Material Fact, Thereby Precluding the Granting of Summary Judgment in Favor of the Respondents.

NEPA explicitly states that "all agencies of the Federal government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official (about specified environmental problems)."[20]

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19. *Id.*

20. 42 U.S.C. Sec. 4332(2)(C) (1970).

The language of Congress is precise and explicit. The *federal agency* "shall include . . . a detailed statement *by the responsible official.*" (emphasis added) The "responsible official" is clearly the head of the federal agency making the recommendation or report. Logic alone compels this interpretation, since the purpose of the EIS is to aid in the *objective* evaluation of a project. If the preparation of an EIS can lawfully be delegated to a state agency or private organization which has a stake in seeing that the project is approved, then there arises a high potential, if not probability, that self-serving statements and assumptions will form the basis of the data presented in the EIS for consideration by the agency decisionmaker.

This is precisely the view taken by the Second Circuit in *Greene County Planning Board* v. *Federal Power Commission.*[21] There, the FPC had in essence delegated the EIS for construction of high voltage power lines to the Power Authority of the State of New York. The entire project, exclusive of one segment under consideration in the suit, was approximately 80% complete. Yet the Second Circuit said:

> (Section 4332(2)) is a mandate to consider environmental values "at every distinctive and comprehensive stage of the (agency's) process." *The primary and nondelegable responsibility for fulfilling that function lies with the Commission.*
>
> The Federal Power Commission has abdicated a significant part of its responsibility by substituting the statement of PASNY for its own. The Commission appears to be content to collate the comments of other federal agencies, its own staff and the intervenors and

21. 455 F.2d 412 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972).

> once again to act as an umpire. The danger of this procedure, and one obvious shortcoming, is the potential, if not likelihood, that the applicant's statement will be based upon self-serving assumptions.[22] (emphasis added)

The court later notes that NEPA requires the agency's *own* EIS to accompany the project proposal through the existing agency review processes.[23]

In an action to halt work on a 31-mile highway to replace a portion of U.S. Route 7 in Connecticut, the district court ruled:

> . . . there is no more basis for the statute to be altered by the regulation of the FHWA here than by the F.P.C.'s interpretation of the guidelines of the Council on Environmental Quality in *Greene County*.
>
> . . .
>
> . . . federal officials must prepare the final version of the impact statement as required by the plain wording of NEPA.[24]

Similar results have been reached in both Wisconsin,[25] and Vermont.[26]

In the latter case, the court considered a factual situation almost identical to that at issue here. The Vermont Highway Department had prepared the EIS under the

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22. *Id.* at 420.

23. *Id.* at 422.

24. *Committee to Stop Route 7* v. *Volpe*, 346 F. Supp. 731, 741 (D. Conn. 1972).

25. *Northside Tenants' Rights Coalition* v. *Volpe*, 346 F. Supp. 244, 248 (E.D. Wis. 1972).

26. *Conservation Society of Southern Vermont, Inc.* v. *Secretary of Transportation*, 362 F. Supp. 627 (D. Vt. 1973).

authority of PPM 90-1. The court heard testimony regarding the degree of cooperation, consultation and review the Federal Highway Administration provided for the preparation of the EIS, as well as testimony concerning the Vermont Highway Department's duty to follow its legislative mandate with regard to highway construction in general, and the project being challenged in particular.[27] Based on *Greene County* and the evidence that the Vermont Highway Department was as much of an interested party as PASNY had been, the court ordered the Federal Highway Administration to prepare its own EIS and issued an injunction halting work on certain portions of the project until the order had been complied with.

However, the decision of the Tenth Circuit in this case, and a recent decision from the Ninth Circuit,[28] have created divergent interpretations of NEPA on the question of delegation.

Citing just a district court decision,[29] and not discussing *Greene County* at all, the Tenth Circuit relied on a record that contained only pleadings and affidavits, rather than substantive testimony that could have been adduced at a full plenary evidentiary hearing, to find that:

> The SHC prepared the impact statement in consultation with state, federal and private agencies. The Secretary of Transportation did not simply "rubber stamp" the State's work. He reviewed it and adopted it as his own. This procedure is consistent with the goals of NEPA.[30]

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27. *Id.* at 629-632.

28. *Life of the Land* v. *Brinegar*, ... F.2d ....., 5 E.R.C. 1780 (9th Cir. 1973).

29. *Finish Allatoona's Interstate Right* v. *Volpe*, 355 F. Supp. 933 (N.D. Ga. 1973).

30. *Citizens Environmental Council* v. *Volpe*, ... F.2d ....., 5 E.R.C. 1989, 1990 (10th Cir. 1973).

The Ninth Circuit decision involved a runway project at Honolulu International Airport, with the preparation of the EIS being delegated by the Federal Aviation Agency to "a private consulting firm which had a major and direct contingent financial interest in the Reef Runway construction."[31] The court there found that the record showed active participation by the FAA in all phases of the EIS preparation process.[32] The court then said:

> The case law dealing with the delegation of EIS preparation has heretofore been limited to federal agency delegation to a state agency and has permitted such delegation where the federal agency significantly participated in the preparation of the EIS.[33]

and distinguished *Greene County* and *Conservation Society* on the *factual* basis that the FAA had not abdicated a significant part of its responsibilities to another organization.[34]

Two district court decisions use the same rationale: *National Forest Preservation Group* v. *Volpe*,[35] and *Iowa Citizens for Environmental Quality* v. *Volpe*.[36] The latter court relies on a single sentence in a one page decision from the Fifth Circuit[37] to find:

> Reliance on Greene County, in my opinion, is misplaced. That case involved a regulatory agency which

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31. *Life of the Land* v. *Brinegar*, ... F.2d ....., 5 E.R.C. 1780, 1784 (9th Cir. 1973).

32. *Id.*

33. *Id.*

34. *Id.* at 1784-85.

35. 352 F. Supp. 123 (D. Mont. 1972).

36. ..... F. Supp. ....., 4 E.R.C. 1755 (S.D. Iowa 1972).

37. *Pizitz, Inc.* v. *Volpe*, 467 F.2d 208 (5th Cir. 1972).

> allowed the applicant for a permit to prepare an environmental statement. The self-interest in such situations is obvious and the regulatory agency should be required to make an independent study of its own as to the environmental consequences.
>
> The same reasoning does not apply to federal grant in aid programs, specifically highway construction. A well developed plan of cooperation and heavy reliance on state agencies has long existed. They have for many years handled all steps necessary to construct a highway. The interest of the state is certainly no more than that of the federal agency which supplies 90% of the financing.
>
> The record is clear that FHWA did not merely rubber stamp the state's work.[38]

The Montana decision, also involving highway construction, found that:

> There is no indication in this case that the EIS prepared by the HA is self-serving. It should not be presumed that states are not concerned with the environmental problems facing us all. . . . Inasmuch as Section 102(2) (C) does not explicitly require that a federal official prepare the EIS this court cannot find as a matter of law that preparation of the EIS by the HA is a violation of the spirit or the mandate of the NEPA.[39]

It is obvious that the Montana and Connecticut district court judges find different "plain" meanings in the language of NEPA.

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38. *Iowa Citizens for Environmental Quality* v. *Volpe*, ... F. Supp. ....., 4 E.R.C. 1755, 1759 (S.D. Iowa 1972).

39. *National Forest Preservation Group* v. *Volpe*, 352 F. Supp. 123, 127 (D. Mont. 1972).

The delegation question thus resolves itself into two fundamental issues:

1. Does NEPA permit delegation of EIS preparation to state agencies or private organizations?

2. If so, does a failure to adequately participate in the preparation and review of the EIS by the federal agency require the preparation of a new EIS?

The decision in *Greene County,* a decision which was denied certiorari by this Court,[40] can be viewed two ways. It may be viewed broadly, as holding that NEPA flatly prohibits delegation, or, more narrowly, that on the particular facts of that case, delegation was not permissible. Those decisions which have permitted delegation have generally not approached *Greene County* from the broad viewpoint, but have distinguished it on the narrower, *factual* basis, as indicated in the excerpts above. But even assuming, for the sake of argument, that delegation *is* permissible, all the cases support the view that the adequacy of that delegation, i.e., the degree of independent, as opposed to "rubber stamp" review, is a factual matter, one to be decided on the basis of a full record. In the case at issue here, it is difficult to see how the relationship of the Kansas State Highway Commission to its legislative mandate, or the scope and degree of Federal Highway Administration participation in the preparation of the Switzer By-Pass EIS, can be validly determined solely on pleadings and affidavits, and not on evidence adduced at a full trial on the merits. Summary judgment is singularly inappropriate in this case.

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40. Supra note 21.

CONCLUSION

Nearly thirty years ago, this Court said in *Sartor* v. *Arkansas Natural Gas Corporation*:

> . . . Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and . . . the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.[41]

It is respectfully submitted that an affirmation of summary judgment in this case would be tantamount to cutting off Petitioners from their right to a trial of these issues: the adequacy of the Switzer By-Pass EIS and the question of delegation. It is also submitted that a decision from this Court, as ultimate interpreter of federal law, is necessary to determine the parameters of NEPA, so that there is only one *national* rule for the Federal Highway Administration to follow in preparing an EIS for highway construction, as required by the *National* Environmental Policy Act of 1969.

For the reasons set forth herein, it is respectfully urged that this Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be granted.

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41. 321 U.S. 620, 627 (1944).

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM—1973

No. 73-1158

THE CITIZENS ENVIRONMENTAL COUNCIL, ET AL.,
Plaintiffs-Appellants,

v.

JOHN VOLPE, SECRETARY OF TRANSPORTATION, ET AL.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES COURT FOR THE DISTRICT OF KANSAS
(D.C. No. T-5057)

(Filed September 19, 1973)

William H. Pickett, Kansas City, Missouri, for Appellants.

Terrence L. O'Brien, Department of Justice, Washington, D.C. (Robert J. Roth, United States Attorney, Topeka, Kansas; Wallace H. Johnson and Roger K. Weatherby, Assistant Attorneys General, Topeka, Kansas; Edmund B. Clark and George R. Hyde, Department of Justice, Washington, D.C., on the Brief), for Appellees.

Donna Munn Heller, State Highway Commission of Kansas, Topeka, Kansas (James H. DeCoursey, Jr., and Paul

W. Clark, State Highway Commission, on the Brief) for Appellee State Highway Commission of Kansas.

Wright W. Crummett, Overland Park, Kansas, for Intervenor-Appellee City of Overland Park, Kansas.

F. Philip Kirwan, Kansas City, Missouri (Gordon R. Gaebler and Blake A. Williamson, Kansas City, Missouri, on the Brief; Of Counsel: Margolin and Kirwan, Kansas City, Missouri and Williamson, Cubbison & Hardy, Kansas City, Kansas), for Intervenor-Appellees J. A. Tobin Construction Company.

Before LEWIS and BARRETT, Circuit Judges and SMITH*, District Judge.

BARRETT, Circuit Judge.

The Citizens Environmental Council (CEC) brought this action to enjoin construction of a federally-assisted highway by-pass. The District Court granted a summary judgment in favor of the defendants-appellees. See The Citizens Environmental Council v. Volpe, ... F.Supp. ..... (D.Kan. 1973).

The State of Kansas plans to relocate 2.76 miles of U. S. Route 69, the Switzer By-Pass, in the cities of Overland Park and Lenexa, Kansas, close to Kansas City, Kansas and Kansas City, Missouri. The suit involves the northern leg of the by-pass which will connect two interstate highways, I-35 and I-435. The by-pass plan originated from a traffic study in 1959. Its location was chosen prior to urbanization of the area but with the expectation of increased population in the future.

On April 2, 1959, pursuant to 23 U.S.C.A. § 128(a), the Kansas State Highway Commission (SHC) conducted a

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*For the Eastern District of Michigan, sitting by designation.

public hearing at Olathe, Kansas to discuss the proposed by-pass. On August 26, 1959, the Federal Highway Administration Division Engineer approved the by-pass. It was also approved by the Regional Engineer. In 1962 the Division Engineer approved SHC's request to acquire the right-of-way. Right-of-way acquisition occurred during 1962-1964 at a time when the area was still rural in character.

Congress enacted the National Environmental Policy Act (NEPA) in 1969, effective January 1, 1970. Section 102 (2) of NEPA requires all federal agencies to submit an environmental impact statement in each recommendation for major federal actions significantly affecting the quality of the human environment. 42 U.S.C.A. § 4332(2)(C). The Council on Environmental Quality (CEQ) issued Interim Guidelines for preparation of the impact statement. It also provided for a draft statement and a final statement. Policy and Procedure Memorandum (PPM) 20-8 was issued in January of 1969 providing for a corridor hearing and a design hearing. Pursuant to PPM 20-8, the design hearing provides an opportunity to present views on major design features including social, economic, environmental and other effects of alternative designs. The social, economic and environmental considerations include the effects of aesthetics, noise, air and water pollution, and displacement of families and businesses.

On April 23, 1971 the design hearing was held in Overland Park, Kansas. The Final Environmental Impact Statement (EIS) was filed with the CEQ on August 26, 1971. Comments by Ruckelshaus, Administrator of The Environmental Protection Agency, were included.

The CEC contends that: (1) the EIS is inadequate; (2) an additional hearing is necessary; and (3) the Court erred in granting appellees' motion for summary judgment.

The CEC alleges that the impact statement is inadequate because it was prepared by the State Highway Commission and because it does not detail alternative routes. The statute provides that the EIS must include:

> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C.A. § 4332(2)(C).

The SHC prepared the impact statement in consultation with state, federal and private agencies. The Secretary of Transportation did not simply "rubber stamp" the State's work. He reviewed it and adopted it as his own. This procedure is consistent with the goals of NEPA. Finish Allatoona's Interstate Right, Inc. v. Volpe, 355 F.Supp. 933 (N.D.Ga. 1973).

The EIS analyzed possible alternative routes, including abandonment of the project, and concluded that they would be in conflict with projected growth patterns. We may certainly anticipate particular circumstances which require an exhaustive, painstaking and extensive report of the environmental effects of alternatives in the EIS. Such, however, is not required in the case at bar. The discussion of the environmental effects of alternatives in the EIS in this case are sufficient to allow a reasoned choice. The EIS prepared by the SHC and adopted by the FHWA fully complies with NEPA requirements.

The CEC alleges that an additional corridor hearing was necessary. The equivalent of a corridor hearing was held in 1959. The land was acquired in the early 1960's. A design hearing was held in 1971. The 1959 hearing met the requirements of PPM 20-8. A new corridor hearing is therefore not required. PPM 20-8 does not apply retroactively. Wildlife Preserves, Inc. v. Volpe, 443 F.2d 1273 (3rd Cir. 1971).

The CEC contends that there were many genuine issues of material fact presented to the trial court. It relies on several conclusory affidavits and a letter from the EPA dated May 4, 1972, stating that there is a lack of data on air pollution and noise levels.

Four affidavits were filed by the CEC to oppose the summary judgment. They are generalized, conclusionary and unsubstantiated. They are insufficient to create a genuine factual dispute. Ashwell & Company v. Transamerica Insurance Company, 407 F.2d 762 (7th Cir. 1969). Rule 56(e), Fed.R.Civ.P., requires personalized affidavits to successfully oppose a motion for summary judgment.

EPA's comments filed on May 4, 1972 were "category 2" comments according to its procedure. They were merely comments of inadequate information but not a condemnation of the project itself. We observe also that these comments were received eight months after the final EIS was filed with the CEQ and six months after design approval by FHWA. EPA had no comment during the period of review following the design hearing. The EIS, in fact, discloses an awareness of noise impact and notes the selection of a depressed main line design to muffle it and to reduce air pollution in the corridor area.

The trial court did not err in granting a summary judgment to the appellees. See The Citizens Environmental Council v. Volpe, *supra*.

AFFIRMED.

APPENDIX B

MARCH TERM—APRIL 11, 1973

Before Honorable Delmas C. Hill, Honorable Robert H. McWillaims, and Honorable William E. Doyle, Circuit Judges

No. 73-1158

THE CITIZENS ENVIRONMENTAL COUNCIL, etc., et al.,
Plaintiffs-Appellants,

v.

JOHN VOLPE, etc., et al.,
Defendants-Appellees,

OVERLAND PARK, KANSAS,
Intervenor-Defendant-Appellee,

J. A. TOBIN CONSTRUCTION CO.,
et al.,
Intervenors-Defendants-Appellees.

This matter comes on for consideration of appellant's motion for injunction pending appeal which was set for hearing before the Court on April 9, 1973 at 2:00 o'clock pm.

The Court having heard the oral arguments of counsel and having read the various motions, memoranda and briefs filed in this cause, and being fully advised in the premises.

IT IS ORDERED that the motion for injunction pending appeal be, and the same hereby is, denied.

The Clerk shall certify a copy of this Order to the Clerk of the United States District Court for the District of Kansas at Topeka, Kansas.

/s/ Howard K. Phillips
Clerk

UNITED STATES COURT OF APPEALS
Tenth Circuit
Office of the Clerk
Denver, Colorado 80202

Howard K. Phillips
Clerk

Telephone
303-297-3157

April 11, 1973

To: All Counsel

Re: No. 73-1158
Citizens Environmental Council, etc., et al.
v. John Volpe, etc., et al., and Intervenors

Gentlemen:

Enclosed is a certified copy of an Order entered today in the captioned case.

Yours very truly,

/s/ Howard K. Phillips
Clerk

amc

Encl.

cc: Mr. William H. Pickett, 2010 Traders Bank Bldg., 1125 Grand Ave., Kansas City, Missouri 64106

Mr. Lawrence R. Reno, 646 Metropolitan Bldg., Denver, Colorado 80202

Messrs. F. Philip Kirwan and Gordon R. Gaebler, 1000 City Natl. Bank Bldg., Kansas City, Missouri 64106

Messrs. James H. DeCoursey, Jr. and Paul W. Clark; Ms. Donna Munn Heller, State Highway Commission, State Office Bldg., Topeka, Kansas

Mr. Wright W. Crummett, 8500 Santa Fe Drive, Overland Park, Kansas 66212

Messrs. Kent Frizzell, Asst. Atty. Genl., George R. Hyde, Atty., and Terrence O'Brien, Atty., Department of Justice, Lands & Natural Resources Division, Washington, D.C. 20530

Mr. Roger K. Weatherby, ASst. U. S. ATty., P.O. Box 1537, Topeka, Kansas 66601

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. T-5057

THE CITIZENS ENVIRONMENTAL COUNSEL, et al,
Plaintiffs,

vs.

JOHN A. VOLPE, Secretary of Transportation, et al,
Defendants.

Memorandum of Decision

(Filed January 3, 1973)

This action was instituted allegedly as a class action by Complaint filed November 23, 1971, in which plaintiffs seek a preliminary and permanent injunction restraining the construction of a relocation of approximately 2.7 miles of U.S. Route 69 in the cities of Overland Park and Lenexa in Johnson County, Kansas. This portion of the relocation is referred to by the parties as the "North leg" of the Switzer By-Pass. Also, mandamus is sought to compel an officer of the United States to perform his duty. 28 U.S.C. §1361. The highway would be constructed on right-of-way acquired for that purpose more than eight years ago.

Neither party has requested the Court to determine whether this action should be maintained as a class action under Rule 23(c) (1). Perhaps such determination is not necessary, and though the Court entertains some doubts about the standing of some of the plaintiffs to maintain the action, other individual plaintiffs do appear to have sufficient interest for themselves and for those similarly situated, and having the right to make claims typical of those

of whom it is alleged are representative of a class, the Court will, on its own initiative, determine that the action may proceed on a class basis. *Johnson* v. *City of Baton Rouge,* 50 F.R.D. 295.

The Court further declares and finds that the representation of the class in this case is adequate to determine the issues involved and that further notice is not necessary to protect the interests of any other person who might be affected by the rulings or judgment in this case. Nor is such notice required. *Northern Natural Gas* v. *Grounds,* 292 F.Supp. 619 (Kans. D.C.).

Plaintiffs apparently base their claims generally on the following grounds:

1. No detailed environmental impact statement required by 42 U.S.C. §4332(2)(c) has been prepared or submitted.

2. The provisions of 42 U.S.C. §1857 h-7 requiring review and comment by the Administrator of the Environmental Protection Agency have not been complied with.

3. The federal defendants have not provided for hearings required by 23 U.S.C. §128, and Policy and Procedure Memo 20-8 (23 C.F.R. App. A).

4. No ruling has been made on whether or not the project conforms to the needs of the locality as required by 23 U.S.C. §109.

5. The construction and use of the proposed highway will violate plaintiffs' rights under the Fifth Amendment, and the Ninth Amendment.

6. The use of the land now acquired for highway right-of-way violates 49 U.S.C. §1653(f) and 23 U.S.C. §138, and the rules promulgated thereunder, because the

right-of-way is used for a public park and recreational area.

A reading of the First Amended Complaint leaves the impression that the matter of plaintiffs' greatest concern is the last mentioned claim. It appears to be the most serious since it has received the greatest attention in the pleadings.

Jurisdiction exists under 28 U.S.C. §1331(a), 28 U.S.C. §1361, and 5 U.S.C. §§701-706.

Defendant John Volpe, Secretary of Transportation, is the public official charged with implementing the Federal-Aid Highway Program. The other federal defendants are: William D. Ruckelshaus, Administrator of the Environmental Protection Agency; and Robert Morrissey, Federal Highway Administration (F.H.W.A.) Division Engineer. The state defendants are: John D. Montgomery, Director of Highways for the State Highway Commission of Kansas; and Robert P. Hagen, Bob Kent, Henry Schwaller, Karl A. Bruek, Gale Moss, and Louis Kampschroeder, members of the State Highway Commission of Kansas.

Plaintiffs seek to halt the construction of a Federal-Aid primary highway within the Kansas City metropolitan area. The relief sought consists of an order temporarily and permanently enjoining the defendants from: 1) letting bids for the construction of the northern portion of the Switzer By-Pass, 2) continuing to approve or finance the northern portion of the Switzer By-Pass, and 3) releasing funds for the project.

Additionally, plaintiffs pray that defendant Ruckelshaus be ordered to make an independent investigation as to whether the Environmental Impact Statement required by 42 U.S.C. §4332(2)(c) complies with the N.E.P.A.

Leave to intervene and to oppose the claims of plaintiffs was granted to the City of Overland Park and the City of Lenexa.

Plaintiffs were permitted to file an amended complaint on March 24, 1972, in which state officers were made parties defendant. Answers were filed by defendant state officers April 13, 1972, by defendant federal officers February 23, 1972, and by intervenor City of Overland Park May 12, 1972. This answer of Overland Park was adopted by the City of Lenexa.

The Court has heard arguments and has received evidence on October 25, 1972 and on November 29, 1972.

The state defendants have filed a motion for a protective order (Doc. 47), in which they assert that on October 12, 1972, the Kansas State Highway Commission (K.S.H.C.) was served with 107 pages of interrogations from plaintiffs and that this was done more than four months after the case was at issue in violation of Local Rule 14.[1] The objection of these defendants is well taken and the motion will be sustained. Plaintiffs have tendered no excuse for permitting this case to languish for months without any activity on their part, after the issues were made up when defendants' answer was filed April 13, 1972. Defendant state officials need not answer the 107 pages of interrogatories submitted.

Motions for summary judgment have been filed by the defendant state officers, by defendant federal officers, by intervenor City of Overland Park. Briefs have been submitted by all parties and by the Sierra Club and John-

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1. In all civil cases, discovery procedures provided for in Federal Rules of Civil Procedure shall be completed by the attorneys within four months after the case is at issue. Rules of Practice of the United States District Court for the District of Kansas.

son County Community Junior College, with the Court's permission as amicus curiae.

Plaintiffs, on November 29, 1972, requested leave to file within five days a proposed amendment to its first amended complaint. The proposed amendment has been presented. It seeks to add another cause of action to the amended complaint by alleging that defendants have failed to comply with the provisions of the Uniform Relocation and Assistance and Real Property Acquisition Policies Act of 1970. Plaintiffs allege that "certain members" of the class plaintiffs purport to represent are or will be displaced persons under the meaning of the Act (42 U.S.C. §4601, et seq.). To support this proposed amendment are affidavits of four persons who speculate that their homes will "supposedly" be taken by the construction of the Switzer By-Pass. Defendants oppose the motion to amend. The motion to amend will be denied, First, because the claims of individual homeowners on this point do not present issues of law or fact common to the named plaintiffs who purport to represent a class and, Second, because the claims are speculative and consideration of individual claims will further delay the final determination of the case and may not properly be considered in this class action.

The Court took under advisement the motions for summary judgment and has reviewed the evidence, the briefs, and has considered the background and the surrounding circumstances relating to the issues in the case. This Court has stated the rule to be followed in determining a motion for summary judgment in the case of *Machinery Center* v. *Anchor Ins. Co.*, 434 F.2d 1, 6. The Court may pierce the pleadings and determine from admissions and affidavits and evidence in the record whether material issues of fact actually exist. If they do not, summary judgment is appropriate. Again, under Rule 56(d), the

Court may ascertain what material facts exist without controversy and what facts are actually and in good faith controverted, and shall make an order specifying the facts without substantial controversy. See *Baca Land Co.* v. *New Mexico*, 384 F.2d 701.

Plaintiffs argue that there are material facts in dispute which may not be resolved by a motion for summary judgment. Plaintiffs concede that a north-south trafficway is needed in the area but urge that the established project should be reconsidered. They also say that they do not complain about all the project but only the northern portion of it. Plaintiffs insist that a fact question remains as to whether the land acquired for use as a right-of-way is used as a park, whether an environmental impact statement should be required from defendant Ruckelshaus, whether there has been an abuse of discretion by the defendants, and whether the Court should require compliance with environmental impact determinations.

This is a proceeding in which equitable relief is sought. The individual plaintiffs who now complain about an invasion of their rights came into the area several years after the project was laid out and the right-of-way acquired. They and the developers of the land west of the By-Pass cannot be heard to say they were not aware of the existence of the contemplated By-Pass when they came into the community. Unless other considerations require this Court to grant relief, it should be said that the individual plaintiffs by coming to a laid-out highway with full knowledge of its existence and eventual construction have no rights in equity to be protected. One may not voluntarily come to a situation, already established, with knowledge of its existence and purpose, and later complain of its use to his inconvenience or detriment as long as the use is not unlawful.

Because of the several attacks leveled at this highway project by plaintiffs, an outline of facts disclosed by the record before the Court is appropriate.

The northern portion of the Switzer By-Pass is the relocation of approximately 2.76 miles of U.S. Route 69 in the cities of Overland Park, and Lenexa, Johnson County, Kansas. The project begins at the north edge of existing I-435 and the Switzer Road Interchange and extends north and west to existing I-35; Affidavit of Robert W. Morrissey, par. 6.

The proposed Switzer By-Pass originated in a comprehensive Kansas City Metropolitan Area Origin and Destination Survey prepared in 1959 by Wilbur Smith and Associates for the State Highway Commission of Kansas and Missouri in cooperation with the United States Department of Commerce, Bureau of Public Roads; Affidavit of Morrissey, par. 6; Ex. A.

This study considered a number of factors. These were: (1) Traffic conditions in the Kansas City Metropolitan Area in 1957; (2) Origin and Destination Survey; (3) Characteristics of travel in 1957; (4) Future travel in the Kansas City Metropolitan Area in 1970-1980; (5) Traffic services of the proposed expressway system; and (6) Traffic volumes—capacity implications (See Ex. A).

As part of this study, population trends, population growth, passenger car registration and ownership, and labor force-employment of Johnson County, Kansas, were specifically considered.

The Switzer By-Pass was included in both the suggested "A" and "B" system of Expressways; Ex. A. The corridor location, resulting from the planning study is depicted extensively in this survey. The by-pass is specifically discussed in relation to I-435, I-35, and as the relocation of U.S. 69; Ex. A, pp. 141, 142, 143.

The corridor location was determined prior to the urbanization of this part of the Kansas City Metropolitan Area, and selected with the expectation that the project area would become increasingly populated in the future, and eventually become densely populated; Affidavit of Morrissey, par. 7; see generally Ex. A.

On April 2, 1959, pursuant to 23 U.S.C. §128(a) the Kansas State Highway Commission conducted a public hearing at Olathe, Kansas, to discuss the proposed By-Pass. The general hearing requirement of 23 U.S.C. §128(a) was specifically implemented in F.H.W.A. Policy and Procedure Memorandum (PPM) 20-8 issued August 10, 1956; Ex. B. This PPM was supplemented by PPM 20-8 issued June 16, 1959. PPM 20-8, issued January 14, 1969 (Ex. C), superseded the earlier PPM's. The hearing informed the public of the general location and alternate routes, and provided an opportunity for comment on the proposal. Design features were discussed, an evaluation of economic aspects conducted, and advice given to land-owners who might be in the right-of-way; see generally, Ex. D; and Affidavit of Morrissey, par. 18(b).

The hearing record includes many examples of the knowledge by State Highway officials that the area in Johnson County through which the by-pass would travel was a fast growing area, developing, or becoming built up, and that subdivisions would develop in the area; Ex. D, 8-9, 13, and 19.

In accordance with 23 U.S.C. 128(a), the State Highway Commisson, on May 20, 1959, transmitted a copy of the transcript of the public hearing (Ex. D) to the Division Engineer, F.H.W.A.

Right-of-way acquisition by the State occurred during 1962-1964. Studies of the area at this time indicated the potential development of commercial and residence sites

and eventually a dense population; Affidavit of Morrissey, pars. 7 & 8; Ex. A. Right-of-way acquisition prior to the development of the area was important in reducing acquisition costs; Affidavit of Morrissey, pars. 7 & 8. The land acquired has remained underdeveloped; Affidavit of Morrissey, pars. 11 & 12.

The State Highway Commission adopted a resolution on August 12, 1959, to request the Bureau of Public Roads add the by-pass route to the Federal-Aid Primary System. On August 19, 1959, this resolution was transmitted to the Division Engineer. That same date, the Division Engineer forwarded this request to the Regional Engineer. In a memorandum to the Division Engineer, dated August 24, 1959, the Regional Engineer stated that:

> "[T]his short length appears to be a desirable addition to the Primary System, and it will perform a definite service between Interstate Routes 35 and 435."

The Division Engineer notified the State Highway Commission on August 26, 1959, that the proposed addition was approved for addition in the Federal-Aid primary system; see Ex. E-1 through E-6.

On March 5, 1962, the Division Engineer approved the State Highway Commission's request to acquire the necessary right-of-way; Ex. F. Later, on July 2, 1964, the Highway Commission certified that the necessary right-of-way had been acquired in accordance with all applicable federal laws and regulations; Ex. G.

Subsequent to the foregoing approvals, Congress passed the National Environmental Policy Act of 1969 (N.E.P.A.), 83 Stat. 852, 42 U.S.C. 4321, et seq. The effective date of this Act was January 1, 1970.

Section 102(2) of that Act provided that all agencies of the Federal Government shall ". . . include in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement . . ." discussing the environmental effect of the proposed action; 4332(2)(c).

The Council on Environmental Quality issued Interim Guidelines for preparation of the 102(2)(c) Environmental Impact Statement on April 30, 1970; 35 F.R. 7390; Ex. H. These Guidelines provided in paragraph 10(b) for a two step procedure involving the circulation of a "draft" statement assessing in detail the potential environmental effect of the proposed project. The Final Guidelines issued on April 23, 1971, 36 F.R. 7724 (Ex. I), do not vary from the two step procedure suggested by the Interim Guidelines.

To implement the N.E.P.A. and the C.E.Q. Guidelines, the Department of Transportation issued D.O.T. Order No. 5610.1 on November 10, 1970; Ex. J. The suggested two statement procedure was contained therein; Ex. J, par. 7d & 7h. In line with this directive, the F.H.W.A., on November 30, 1970, issued a draft Instructional Memorandum titled Interim Guidelines for Implementation of Section 102(2)(c) of the National Environmental Policy Act of 1969; Ex. K. This I.M. required the preparation of an Environmental Impact Statement for projects receiving design approval after February 1, 1971; Ex. K, par. 4. Subsequently, on August 27, 1971, PPM 90-1 superseded the Instructional Memorandum with respect to N.E.P.A. implementation; Ex. L. Accordingly, on March 4, 1971, a draft statement was issued soliciting comments from appropriate federal agencies on the environmental effects of the proposed project; Ex. M. The Environmental

Protection Agency was requested to comment; Ex. M. The comment was issued on April 6, 1971; Ex. M.

On March 31, 1971, the Metropolitan Planning Commission, Kansas City Region, reported to the State Highway Commission that the proposed highway was in agreement with the Freeway and Expressway Plan adopted by the Planning Commission; Ex. N. Copies of the Freeway and Expressway Plan adopted by the Planning Commission and the Highway Commission of both Kansas and Missouri were furnished F.H.W.A. on April 16, 1971; Ex. O. This plan contained the Switzer By-Pass Project. The Kansas City Region Regional Plan, prepared and accepted by the Planning Commission lists the Switzer By-Pass among those projects considered to be "first or top priority" and a "committed" project; Ex. P.

The amended PPM 20-8, Ex. C issued January 14, 1969, required two public hearings, a corridor hearing and a design hearing; see par. 6a. As the Highway Commission had previously conducted a corridor hearing on August 2, 1959, only a design public hearing was held thereafter.

The design hearing, considering the specific location, major design features, relocation, and economic, social, and environmental effects of the proposed highway, was held at Overland Park, Kansas, on April 23, 1971; Ex. Q. A transcript of the hearing was forwarded to the Federal Highway Administration.

The Final Environmental Impact Statement, with attached comments (Ex. R), was filed with the Council on Environmental Quality on August 18, 1971, and accepted by the Federal Highway Administration on August 26, 1971; Ex. S. The comment of Defendant William Ruckelshaus, Administrator, Environmental Protection Agency, dated April 6, 1971, was included in the attachments to that statement.

On October 29, 1971, the State issued a Study Report For Design Approval, Ex. T. This report analyzed design alternates and provided design recommendations for each of the major design features of the proposed project. The report at page 1 stated:

> "The anticipated social, economic, and environmental effects are reflected by the Final Environmental Statement. This Statement shows that the goals and objectives of the urban plan as generally adopted by the overall community are compatible with this recommended design."

Design approval for the project and authorization to complete plans, specifications and estimates were given on November 16, 1971; Ex. U.

Environmental considerations were a significant factor bearing upon the location and final design features of the project; Affidavit of Morrissey, pars. 10-16 Exs. R & T.

William Ruckelshaus, Administrator, Environmental Protection Agency, issued a comment on the Final Environmental Impact Statement on May 4, 1972; Ex. V.

Plaintiffs filed this suit on November 23, 1971, seeking to enjoin construction of the proposed Switzer By-Pass.

Stripped of a great deal of verbiage, the amended complaint alleges, in substance, that the Environmental Impact Statement (E.I.S.) fails to comply with the requirements of 42 U.S.C. §§4431 and 4432, because the conclusions therein stated do not constitute independent determinations by the Department of Transportation (D.O.T.), but merely reflect the opinions of defendants John B. Montgomery and K.S.H.C., two proponents of the project. The further contention is that defendant Ruckelshaus, Administrator

of the Environmental Protective Agency (E.P.A.) did not review the statement and comment in writing on the environmental impact of the matter to which 42 U.S.C. §4332 (c) applies and make such comments public. It is claimed that he also failed to make an independent investigation and determination of the environmental impact of the project and that his failure to so act was arbitrary and capricious, and prevented the reference of the project to the Council on Environmental Quality for further review. It is also alleged that requirements of the acts referred to apply to highway projects such as the northern leg of Switzer By-Pass.

The record discloses that E.I.S. was prepared by the K.S.H.C. in cooperation with the F.H.W.A., the D.O.T. and other agencies of the federal government. Highway construction programs are carried out in most instances, certainly in this one, and are required to be carried out by the joint development and execution of highway programs. 25 U.S.C. §101, et seq. The N.E.P.A. expressly provides that the Act shall not affect statutory obligations of any agency to coordinate or consult with any other federal or state agency. The preparation of E.I.S. by the K.S.H.C. in cooperation and consultation with F.H.W.A., is consistent with the intent of Congress. When consideration is given to the procedures required to plan and establish a highway project and then apply for federal aid to pay for it, the necessity for an early E.I.S. statement by the K.S.H.C. at an early stage of the proceeding is apparent.

Both the C.E.Q. Interim Guidelines, issued April 30, 1970, 35 F.R. 7390 (Ex. H), and the Final Guidelines, issued April 23, 1971, 36 F.R. 7724 (Ex. I), permits K.S.H.C. to prepare the Environmental Impact Statement subject to review and acceptance by F.H.W.A. officials. The only

requirement that a draft Environmental Impact Statement be circulated for comment is found in Section 7 of the C.E.Q.'s Guidelines:

> "A Federal agency considering an action requiring an environmental statement, on the basis of (1) a draft environmental statement for which it take responsibility or (2) comparable information followed by a hearing subject to the provisions of the Administrative Procedure Act, should consult with, and obtain the comment on the environmental impact of the action of, Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved."

The draft E.I.S., therefore, is in essence an administratively created device for facilitating consultation with appropriate agencies. Nothing in the guidelines requires that the draft statement be prepared in the first instance by the federal agency responsible for the proposed action. The only requirement set forth in C.E.Q.'s Guidelines is that the federal agency "take responsibility" for the draft statement which is circulated.

Moreover, Section 2 of the final Guidelines provide:

> "2. *Policy.* As early as possible and in all cases prior to agency decision concerning major action or recommendation or a favorable report or legislation that significantly affects the environment, Federal agencies will, in consultation with other appropriate Federal, State and local agencies, assess in detail the potential environment impact in order that adverse effects are avoided . . . ."

The Interim Guidelines, Section 2, contained substantially similar wording. Thus, both the Interim and final Guidelines emphasized that state and local government units were to be drawn into the F.H.W.A. administrative

process so as to assess in detail the environmental impact of the proposed action to be taken. This consultation to "assess in detail" by state and federal agencies acquires added significance when considered in the light of the unique F.H.W.A.—state relationship, 23 U.S.C. §101, et seq. Section 3(d) of the final Guidelines stated:

> ". . . It is imperative that existing mechanisms for obtaining views of Federal, State, and local agencies on proposed Federal actions be utilized to the extent practicable in dealing with environmental matters."

The Interim Guidelines contained similar wording in Section 2.

Both the F.H.W.A. draft Instructional Memorandum titled "Interim Guidelines for Implementation of Section 102 (2) (c) of the National Environmental Policy Act of 1969" (Ex. K), issued November 24, 1970, and PPM 90-1 (Ex. L, par. 6b & i), issued August 24, 1971, which superseded the I.M. with respect to N.E.P.A. implementation, required that the State Highway Commission prepare the draft and final Environmental Impact Statements.

It appears from the public interpretations made by the Chairman of the Council on Environmental Quality (C.E.Q.) that the agency has likewise accepted this procedure. (See testimony of Russell E. Train, pp. 261 and 263, Ex. X, "Red tape—Delays and Excessive Paper Work in Administration of the Public Works Program.")

When considered in the light of the provisions and requirements of the Federal-Aid Highway Act, the interpretations by D.O.T. and F.H.W.A. of the N.E.P.A. and C.E.Q. Guidelines countenancing state participation in preparation of E.I.S., the procedures in this case do not appear clearly erroneous and should be accepted as reasonable and practical, if not, in fact, necessary, if any substantial development of transportation facilities are to be carried on in this country.

Plaintiffs predominate purpose in maintaining this action, judging by the emphasis placed on this issue by them in the record, is to somehow require the use of a strip of land, acquired several years ago for highway purposes, for a public park and recreational area. They base their claim in this regard on the provisions of 49 U.S.C. §1653(f) and 23 U.S.C. §138, and regulations promulgated thereunder.

Neither of the statutes apply to the situation before the Court in this case. The land acquired for highway right-of-way was not taken from publicly owned land used as a public park, recreation area, or wildlife and waterfowl refuge of national, state or local significance, as determined by federal, state or local officials having jurisdiction thereof. The right-of-way in this case, as revealed by the record, was acquired from private owners of many tracts of land.

Also, it appears that the City of Overland Park, through which the largest segment of the right-of-way exists, has a City Park Department and has established a City Park System as it is authorized to do. The undisputed evidence is that the By-Pass right-of-way was never included in the City Park System, was never intended to be and that other and more practical and appropriate recreational facilities are being constructed in the neighborhood for the benefit of those who live thereabout; Affidavit of Larry Flatt, Doc. 51.

Since the right-of-way has never been designated for use as a public park or recreational area, the laws relied upon by plaintiff do not apply and their claim may not be sustained. *Penn. Environmental Council* v. *Bartlett*, 454 F.2d 613 (3 Cir.).

It ought to be observed that the record discloses the careful study and planning for this By-Pass Project by a number of city, state, federal and metropolitan agencies.

Public hearings and discussions were held over a period of fourteen years to consider the need, the advisability and the feasibility of this By-Pass. The officers of the cities, the county, the state, the federal government have studied and approved its establishment. A great deal of public money has been appropriated and spent to establish the By-Pass which all the public officials charged with the responsibility of doing so have approved. A Community College, accommodating several thousand students in the area, was located and built with the construction of this By-Pass a major factor in arriving at a choice of location. Zoning ordinances and programs of community development have been established relying upon the eventual construction of this By-Pass to facilitate the movement of traffic and accommodate the great majority of people whose interests and welfare are more than equal to the class allegedly represented by plaintiffs. To enjoin the construction of this highway after twelve years of effort to obtain it because a relatively few persons wish it to be used as a recreational area, is neither reasonable, practical or equitable. There must come a time, after the passage of years, when a needed public improvement, such as this one, ought to be built.

After considering all the numerous contentions of plaintiffs, the Court, after threading its way through the provisions of several legislative acts and regulations adopted thereunder, all of which, it should be assumed, were purposely enacted or promulgated to be reasonably and sensibly applied,[2] must find and determine the environmental impact statement required by 42 U.S.C. §4332(2)(c) has been prepared and submitted by F.H.W.A., that the provisions of 42 U.S.C. §1857 requiring review and comment by defendant Ruckelshaus, as administrator of E.P.A., have observed to the extent required by the statute as its ap-

2. See National Forest Group v. Volpe, D.C.Mont., Dec. 11, 1972.

plication is interpreted and applied by the responsible administrators of the Council on Environmental Quality.

The Court further finds and determines that the record before it shows conclusively that hearings required by 23 U.S.C. §128 and Policy Procedure Memo 20-8, have been provided and that a determination has been made that the project conforms to the needs of the locality as required by 23 U.S.C. §109.

The Court must also conclude that no constitutional right of plaintiffs have been violated. They came to a project already announced and for which right-of-way had been acquired. Having done so, none of their constitutional rights could be violated.

The contention that the land acquired for a highway right-of-way should be used as a public park and recreational area is without merit.

After careful scrutiny of the voluminous record before it, and after considering the circumstances and interests of all the parties, the delay by plaintiffs in prosecuting their case, and the commonsense application by the administrators of the several governmental agencies in carrying out the mandates of Congress, this Court concludes that the pleadings in this case should be pierced and the actual issues determined. In doing so, it is now found that no material issue of fact exists and that the case is ripe for disposition by summary judgment.

IT IS THEREFORE THE RULING AND ORDER AND JUDGMENT of this Court that the motions of the defendants and the intervenors for summary judgment, be, and they are, sustained, and plaintiffs' action is dismissed.

Dated at Topeka, Kansas, this 3rd day of January, 1973.

/s/ George Templar
United States District Judge

APPENDIX D

The National Environmental Policy Act

PURPOSE

Sec. 2. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations,

and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.

* * *

APPENDIX E

DEPARTMENT OF TRANSPORTATION

FEDERAL HIGHWAY ADMINISTRATION

PREPARED BY THE STATE HIGHWAY COMMISSION OF KANSAS

FINAL

ENVIRONMENTAL STATEMENT

FOR

US-69 (SWITZER ROAD) IN JOHNSON COUNTY, KANSAS

PURSUANT TO SECTION 102(2)(C)
P. L. 91-190

KANSAS HIGHWAY COMMISSION

FINAL ENVIRONMENTAL STATEMENT

69-46 U-083-3(22) Parts I and II
U.S. 69 Alternate (Switzer Road)
Johnson County, Kansas

SECTION I. *Project Description*

The project is located within the cities of Overland Park and Lenexa, Kansas. It begins at an existing interchange of Interstate I-435 and US-69 (Switzer Road) and extends 2.760 miles north and northwesterly to a proposed directional interchange connection with Interstate I-35 immediately north of 87th Street.

The purpose of the facility is to complete a prolonged and demanded improvement. In response to local requests, the original rights of way were purchased in 1964. Confirmation of the need is reflected in the anticipated average daily traffic (ADT) for the design year 1990 which numbers 51,602 vehicles per day.

The proposed project design envisions a four-lane divided highway with depressed median. The design includes concrete pavement with stabilized shoulders for the project proper; detours and frontage roads are to be constructed with asphaltic concrete. Full control of access utilizing chain link fencing is included in the design to afford maximum safety. At cross street locations, the structures will include sidewalks for pedestrian traffic. The project will be constructed within existing right of way. To complete the design of the interchange locations (103rd, 95th, and 87th Streets) to current safety standards, additional rights of way will, however, be required at these points.

The project location is further identified by the area map, Figure 1 and the aerial mosaic, Figure II.

SECTION 2. *The Probable Impact of the Proposed Project on the Environment*

The area is entirely urban in nature. Most of the development has occurred since the original purchase of rights of way in 1964 and has formed in anticipation of the project. Controlling governmental units have regulated such development to provide a planned and controlled growth centered around the improvement. Areas not now developed are or will, with the completion of the project, follow the urban, industrial, and commercial patterns existent within the project's area of influence.

There are no conditions existent which address the interests of fish and wildlife. The fact that the project has been protected from the surrounding city growth may have attracted occasional wildlife in the form of rabbits and prairie fowl.

Railroad facilities are not involved.

There are no known mineral deposits within the corridor and the expansion potential of such resources is mute.

The project has been reviewed by State Historical Society archeologists and found to be void of any indications of such sites. There are no known historical areas in the area of influence.

There are no lands as defined under section 4(f) of the Department of Transportation Act as related to public parks, public recreational areas, wildlife refuge and historical sites.

The project is uniquely fitted to local traffic patterns. Interchanges at 103rd Street, 95th Street and at 87th Street will require improved geometrics to carry increased traffic assignments. The improvement to local and long distance travel mobility of the area has been recognized for a decade. Traffic demands have increased several times beyond predictions made in 1964. The project will create a most favorable environmental impact upon traffic quality and its associated social and economic opportunity and will compliment the existing and rapidly expanding residential-commercial propagation of the area.

With the depression of the main line traffic lanes, an opportunity to provide continuity of existing local streets is afforded.

The inclusion of early seeding and erosion control measures along with bluegrass sod and placing of Select Soil will establish initial and lasting pollution controls.

The proposed roadway will not significantly alter the existing character of the area. The requirement for additional right of way at interchanges will force the relocation of five families living in three duplex rental structures and two families whose properties will be required. The duplex owner also uses one apartment as an office. Adequate replacement housing is available within a reasonable distance. Local parallel streets will be rerouted. Circulation will not be greatly affected at 103rd, 95th and 87th Streets.

A carefully planned approach to the location and to the design of this project has been made in close cooperation with local, state and federal agencies. The impact of the project upon the area environments, coupled with the impact of projects being developed by others, has multiplied the favorable results which will be obtained.

Project 69-46 U-083-3(20) south of I-435 is presently scheduled for construction at approximately the same time as this project. Therefore, the continuity of the north-south traffic using this portion of US-69 will be established.

The existing Metcalf Avenue portion of US-69 is located two miles east of Switzer Road. The construction of the Switzer Road location (this project) will reduce traffic on Metcalf Avenue. Therefore, increased safety at the existing intersections and entrances, along with decreased ambient noise, can be expected.

SECTION 3. *Probable Adverse Environmental Effects Which Cannot be Avoided*

The displacement of three duplex dwellings and two houses are unavoidable effects precipitated by the project.

A use of vehicular traffic would also increase the noise level; however, an effort to reduce such effects was made by selecting a depressed main line design which appreciably muffles ambient noise levels.

Elementary school districts are not divided by the project. Although high school and junior high school districts were organized after the purchase of the right of way for this project, it does form a division of such districts. Harm to pedestrian traffic is minimized by providing sidewalks on cross street structures.

SECTION 4. *Alternate Routes and Designs*

Alternate routes, after years of development contemplating the construction of the project on existent rights of way, are in conflict with existent and projected growth patterns. The project is in complete compliance with the transportation plan developed by the Kansas City Area Metropolitan Planning Commission. To retain present routing would result in local traffic stagnation and the overloading of portions of I-435 and I-35.

Any plan which would not use the existent right of way would be inconsistent with commitments and planning which has been made in cooperation with local agencies, governmental units and the community.

Design proposals have been generated by the progressive analysis of alternate designs at the three proposed interchange locations (103rd, 95th and 87th Streets). The interchange designs are based on routing simplicity combined with adequate traffic services for the design year of 1990. Future internal expansion can be accomplished as the need may arise.

SECTION 5. *The Relationship Between Local Short-Term Uses of Man's Environment and the Maintenance and Enhancement of Long-Term Productivity*

The proposed project is compatible with the anticipated social and environmental changes of this area of Overland Park and Lenexa and enhances its potential as a long-term productive facility.

A safer and more effective use of the present traffic facilities will be created by the addition of this improvement.

This facility will offer the potential for the acceleration of planned and future development of the adjacent area.

SECTION 6. *Irreversible and Irretrievable Commitments of Resources*

The many elements which will go into this project cannot be classified as irreversible or irretrievable commitments of resources. If the facility is no longer needed as a transportation network or if a greater need arises for the area occupied by the highway facility, it can be converted to the needed land use. Most highway construction materials are not consumable; therefore, conversion to other uses may require the reshaping of the existing resources. Air space as a resource is exercised in situations where it is economical and feasible to do so. The use of air space is not eliminated; its use in this project is now, however, not contemplated.

SECTION 7. *Problems and Objections*

The coordination and cooperation of the county and city officials and the assistance rendered by several inter-

ested citizens organizations and individuals has led to the resolution of many problems which developed on this project.

A few major design problems and objections have been encountered. An objection to closing one of the parallel streets has been overcome by the proposal of extending this side street to an intersection approximately 275 feet farther away from the highway ramp intersection. Another objection has been overcome by the proposal of including access at one of the cross streets.

A proposal to not construct this project has been determined invalid. A future traffic impasse along with adverse social, economic and environmental consequences would be created by this proposal.

SECTION 8. *Summary of Steps Taken to Minimize Harm*

The summation of the project's use of the environment terminates in a cumulative enhancement rather than abuse of its effect. The project and its total effect was considered from its inception; therefore, adverse effects were avoided or prudently minimized.

A depressed main line grade design with short fill areas to accommodate cross surface drainage will minimize the ambient noise level, enhance the aesthetic and visual continuity of the established community, along with a minimum of division and disruption of present cross traffic facilities.

SECTION 9. *Summary of the Environmental Comments Received at the Design Public Hearing*

This summary of the environmental comments will analyze both positive and negative effects along with references to those comments received.

Numerous comments and letters indicating very little need for this project, mostly originating from one source and amplified by an article printed in the Johnson County Scout dated May 7, 1971 (ref. #65, #78 to #82, #85 to #127, #177 to #186, #192 to #201, and #311) were received. Reference #65 and #311 contained a statement "up to a week ago very few people outside the commercial interests promoting this project really knew what is involved or whether or not it is a vital or necessary road for the county".

The Switzer Bypass portion of the US-69 highway has been under consideration by the local county, city and the State Highway Commission of Kansas since some time in the 1950's. (ref. #306 to #310)

A public hearing on the route location was held April 2, 1959. (ref. #307 to #309)

Right of way acquisition on the section north of I-435 was in the process during the period 1959 to 1964. (ref. R/W records and #310)

Right of way acquisition on the section South of I-435 was acquired during the period 1963-64. (ref. R/W records)

This traffic corridor has been shown as an essential route in all the planning studies for this area since 1959. (ref. #2) These studies referred to include "Kansas City Metropolitan Origin and Destination Study"—Wilbur Smith and Associates (1959); "Report on Traffic Study and Master Plan for Roads, Streets and Highways in Johnson County, Kansas"—Black and Veatch (1967); "Comprehensive Plan, Overland Park"—Hare and Hare (1963); and "Cooperative Through Planning"—Metropolitan Planning Commission—Kansas City Region (1969

Note: Ref. # refers to the design public hearing page identification number.

annual report and prior reports). (ref. on file) This project agreement (22) will service the local area whose development has been and will continue to be generated with the road being a major consideration of the planned activity of the local community. If the northern project is not constructed the continuity of this traffic corridor would be broken and therefore the southern project could be replaced by a system of arterial streets which would not concentrate traffic at one point. Both projects are essential to facilitate the movement of traffic in this traffic corridor.

Delegations of public officials and the Chamber of Commerce of Overland Park requested the State Highway Commission of Kansas to advance the construction of the entire route (US-69 to I-35). (ref. #302 and #304)

All of the recited circumstances would indicate that the project has had wide support and publicity, at least since 1959. The physical evidence of the presence of the right of way corridor prior to the residential development and to the planning of the street system of this development, shows conformance with the alignment of this route and would seem to have been an adequate indication of the Commission's intention.

The statement is made that the primary purpose of this project is to relieve congestion on the Metcalf Avenue portion of US-69. (ref. #11, #37, #65, #168, #242 and #311)

Although it is true that the relief to Metcalf Avenue is a major benefit to be gained from the bypass, there are many other important reasons for constructing this route. Support of all local governing bodies including the cities of Lenexa and Overland Park, the Metropolitan Planning Commission, Johnson County, and the Junior College is evidenced by their strong responses. (ref. #13, #17,

#165-#166, #222, #227-#228, #230, #237, #264-#265 and Section 10-Page 8) Support for the project also comes from many citizens as evidenced by their letters. (ref. #161, #163, #170, #174, #190, #203, #207, #209, #211, #215, #218, #224, #246, #248-#251, #253, #255, #258, #267, #268, #270 and #274)

Traffic projections show that unless the portion north of I-435, this project, is constructed, the existing I-435 (from Switzer Road west to I-35) and existing I-35 (from the I-435-I-35 junction north to 87th Street) would be seriously overloaded by the design year of 1990. The section of I-435 referred to would have a traffic demand of over 120,000 ADT, well over its capacity. This same section, if this project is constructed, would have a traffic demand of approximately 86,000 ADT which would allow an acceptable level of service on these sections of the Interstate System. (ref. see section 4 and traffic study)

Traffic studies show that approximately 5% of the total traffic would be trucks. (ref. traffic study) Through truckers and local truck stops and facilities would benefit from this route; however the major benefit would accrue to local traffic originating from adjacent areas and immediately south of I-435.

This indicates approximately 95% of the principal traffic served will be that of the community college and the developing residential areas adjacent to the project and extending south. (ref. traffic study)

The traffic and capacity problems just discussed are a clear indication that the Commission has indeed considered alternates including the alternative of not constructing the Switzer Bypass portion north of I-435.

The suggestion that the land could be used for a park if the highway was not constructed (this project). (ref.

#11, #16, #78 to #82, #85 to #127, #177 to #186, #192 to #201)

The land in question was acquired partly by the State Highway Commission and partly by the cities of Overland Park and Lenexa for highway right of way. The portions acquired by the cities were paid for by state highway funds; Kansas law would not permit the Commission to donate this land for park purposes or to permit such use by the cities without full reimbursement to the state highway fund. Part of the land was condemned and part of it was purchased. By condemnation, the Commission can acquire only an easement for highway right of way. (ref. KSA 68-413). By purchase it can acquire a greater interest but would not be authorized to dispose of the right of way so acquired by donation for park purposes, or by selling it for a limited use, such as for park purposes.

The statements (ref. #311) imply that a representative of the State Highway Commission of Kansas had made statements indicating that the Commission was not really concerned about the effects on the environment or the cost and was not willing to consider any alternate. As has been pointed out, the Commission has considered a number of alternates, including that of not building a road.

Our concern with the environment is evidenced by the fact that a full environmental statement was prepared for this project, circulated to over twenty Federal Agencies as required by law, and this environmental statement was available at the public hearing. (ref. #1) None of the fourteen replies from the Federal Agencies commented unfavorably on the environmental analysis. Only two agencies had precautionary statements. (ref. attachments)

Very few of the comments (those referenced) made at the public hearing or subsequent to the hearing spoke to

specific environmental factors or to the environmental statement. A few comments were made and received about preservation of certain trees and shrubs along the right of way.

It appears that in most cases we shall be able to preserve the trees mentioned or will replace them with adequate landscaping.

In response to the individual asking for the construction of a higher fence than normally constructed (4'), we propose to install a 5' high chain link fence. (ref. #16)

In response to not close a parallel street, we are recommending that this street not be closed but to be extended to an appropriate intersection location. (ref. #15, #17, #18, #19, #20, #63, #129 to #145, #156, #158)

As with all projects the consideration of all environmental factors is a very major item of concern to the State Highway Commission of Kansas.

In the conclusion of this section, a number of statements and letters indicate a real feeling of compliance to the consideration and discussion of the environmental effects. (ref. #13, #14, #17, #18, #19, #21, #70, #161, #163, #165, #168, #170, #172, #174, #188, #190, #203 to #288)

SECTION 10. *Summary of the Environmental Comments Received From Federal Agencies*

Twenty-four Federal agencies and several state agencies received a copy of the draft environmental statement for their review and comment regarding this project.

Eleven of the Federal agencies responded with a concurrence or no comment; ten did not respond and three replied as follows:

Department of Health, Education, and Welfare—"It is suggested, however that precautions be exercised during construction and with the finished product to insure that mosquito breeding or other vector problems are not created because of it."

The proposed ditch grades and the drainage structure design along with the construction specifications, should preclude mosquito breeding and other vector problems.

U. S. Department of Agriculture-Soils Conservation Service—"It does not appear that any existing conservation measures will be affected. Also there should be no effect on wildlife." "However I believe it would be appropriate if the measures to be used, such as early seeding and application of top soil were mentioned in the statement."

The proposed Project Water Pollution Control (Soil Erosion), placing of Select Soil, permanent seeding, and the landscaping of the intersection locations should adequately cover these suggestions.

Department of the Army-Kansas City District-Corps of Engineers - - - "The only effect we note will be a probable lake access enhancement." "No land requirements."

The state agencies replied as follows:

Department of Administration-Budget Division - - - "No State objections."

Kansas State Park and Resources Authority - - - "No conflict." "For present and future recreation and park plans and programs—coordinate with the local identities of government."

State Water Resources Board - - - "Would not affect."

The Metropolitan Planning Commission-Kansas City Region replied as follows: "Is a key element." "Will aid and influence the shaping of future development." "We are in agreement."

In that no specific negative comment was received from the federal and state agencies addressed toward environmental features and that any comment offered was positive in nature, concurrence in the draft environmental statement has been given by all Federal Departments as required by Section 102(2)(C), P.L. 91-190, the National Environmental Policy Act of 1969.

JOHNSON COUNTY
U.S. 69 ALTERNATE
(SWITZER BY-PASS)
OVERLAND PARK — LENEXA
PREPARED BY THE
STATE HIGHWAY COMMISSION OF KANSAS
DESIGN DEPARTMENT
Proj 69 46 U083-3(22)
0' 2,000' 4,000' 6,000'
Scale
IMPROVEMENT
FRONTAGE ROADS
A45
435
35
50
L E N E X A
O V E R L A N D
P A R K
Pflumm
Rd.
Quivira
Rd.
Bond
Rd.
Nieman
Rd.
Reeder
Goddard
Seltzer
Rd.
Martin
Melrose
Dr.
Blue
Jacket
BEGIN PROJECT
END PROJECT
R.R.
Alternate
Santa Fe
T.-S. L. & S. F.
R. R. 4
Drive
Sec.
Sec.
Sec.
Sec.
Sec.
Sec.
Sec.
Sec.
Sec.
Sec.
Sec.
Sec.
10
3
34
11
2
35
20
1
12
25

APPENDIX F

ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

Mr. Robert W. Morrissey
Division Engineer
Federal Highway Administration
512 West 6th Street
Topeka, Kansas 66603

Dear Mr. Morrissey:

In response to the final environmental impact statement which the Federal Highway Administration has filed with the President's Council on Environmental Quality on the proposed completion of U.S. 69 (Switzer Bypass) project No. 69-46 U832-3(22) and pursuant to Section 309 of the Clean Air Act, as amended, dated December 1970, we have the following comments to make on the project's final environmental impact statement.

Two major environmental impacts of the project which were not investigated in sufficient depth are air pollution and excessive noise levels.

1. The statement points out that the freeway will probably attract additional traffic. The traffic will be moving at freeway speeds and will not emit as many pollutants per car as stop and start slow-moving traffic. However, it is not clear that there will be a net reduction in air pollutants in the area. Studies were not done to determine what the ambient air pollution level will be in the adjacent residential areas.

2. The noise level generated by the freeway traffic moving at high speeds may be much higher than with

normal stop and start driving on local roads. Studies should be made to determine if the projected noise levels will exceed those acceptable for residential areas. We suggest you see FBF, procedure memorandum PPM90-2 "Noise Standards."

Because of the lack of data on both air pollution and noise levels which will result from the project, it is impossible to determine the extent or impact of environmental damage. We suggest that data sufficient to make these determinations be compiled before construction is initiated.

Very truly yours,

Jerome H. Svore
Regional Administrator

cc: Mr. Dan Joseph
General Council, EPA

APPENDIX G

Transmittal 202
90-1
August 24, 1971

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

POLICY AND PROCEDURE MEMORANDUM

GUIDELINES FOR IMPLEMENTING SECTION 102(2)(C) OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, SECTION 1653(f) OF 49 U.S.C., SECTION 470f OF U.S.C., AND SECTION 309 OF THE CLEAN AIR ACT OF 1970

Par.

1. Purpose
2. Authority
3. Definitions
4. Policy
5. Application
6. Procedures

Appendix A—Procedures on Historic Preservation

Appendix B—Example of Design Concurrence Letter

Appendix C—Location Stage Flow Chart

Appendix D—Design Stage Flow Chart

Appendix E—Environmental Statements—Contents and Format

Appendix F—Evaluating Highway Section Environmental Effects

Appendix G—Inter-Agency Review of Draft Environmental Statements

Appendix H—Selections from PPM 20-8, dated January 14, 1969, for use with the National Environmental Policy Act Guidelines

Appendix I—Purchasing Copies of Environmental Statements

1. PURPOSE

To provide guidelines to highway departments and Federal Highway Administration (FHWA) field offices to assure that the human environment is carefully considered and national environmental goals are met when developing federally financed highway improvements.

2. AUTHORITY

a. *Section 102(2)(C) of the National Environmental Policy Act of 1969 (P.L. 91-190)* states that all agencies of the Federal Government shall:

"include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible officials on - - -

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by Section 552 of Title 5, United States Code, and shall accompany the proposal through the existing agency review processes."

b. *Section 1653(f) of 49 U.S.C.*[1], *Section 138 of 23 U.S.C., and Section 4(f) of the Department of Transportation Act* (all of which are hereafter referred to as "Section 4(f)") permits the Secretary of Transportation to approve a program or project which requires the use of publicly owned land from a park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or land from an historic site of national, State, or local significance as so determined by such officials (hereafter "Section 4(f) land") only if:

(1) there is no feasible and prudent alternative to the use of such land, and

(2) such program includes all possible planning to minimize harm to the Section 4(f) land resulting from such use.

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1. Section 1653(f) of 49 U.S.C. is identical to Sections 138 of 23 U.S.C. and 4(f) of the Department of Transportation Act as amended in Section 18 of the "Federal-Aid Highway Act of 1969."

c. *Section 470f of 16 U. S. C.*[2] provides that the head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to such undertaking.

d. *Section 309 of the Clean Air Act of 1970 (Public Law 91-604)*, as amended, provides:

"(a) The Administrator (Environmental Protection Agency) shall review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to this Act or other provisions of the authority of the Administrator, contained in any . . . (2) newly authorized Federal projects for construction and any major Federal agency action (other than a project for construction) to which Section 102 (2)(C) of Public Law 91-190 applies . . . . Such written comment shall be made public at the conclusion of any such review."

3. *DEFINITIONS* (as used in this memorandum)

a. *Highway Section*—a substantial length of highway between logical termini (major crossroads, population centers, major traffic generators, or similar major high-

2. This requirement is also found in Section 106 of the National Historic Preservation Act of 1966.

way control elements) as normally included in a single location study. (See paragraph 6).

b. *Agency Decision*—FHWA approval of the location of a highway improvement. (Subsequent approval of the design; right-of-way acquisition; the plans, specifications, and estimates (PS&E) or authorization to construct a project within the highway section is not, for the purposes of this memorandum, an additional agency decision.)

(1) A determination to prepare and process a supplemental environmental statement would be the basis for a new agency decision for either a highway location or design. (See paragraph 6p).

(2) In accordance with the Secondary Road Plan as permitted by Section 117 of Title 23 U. S. C., the approvals of the location, design, right-of-way acquisition and construction (PS&E) have been delegated to the appropriate State highway department for highway improvements on the Federal-Aid Secondary System.

c. *Environmental Statement*—a written statement containing an assessment of the anticipated significant beneficial and detrimental effects which the agency decision may have upon the quality of the human environment for the purposes of:

(1) assuring that careful attention is given to environmental matters,

(2) providing a vehicle for implementing all applicable environmental requirements, and

(3) to insure that the environmental impact is taken into account in the agency decision.

d. *Negative Declaration*—a written document in support of a determination that, should the proposed highway

section improvement be constructed, the anticipated effects upon the human environment will not be significant.

e. *Highway Agency (HA)*—the agency with the primary responsibility for initiating and carrying forward the planning, design, and construction of the highway. For highway sections financed with Federal-aid highway funds, the HA will normally be the appropriate State highway department. For highway sections financed with other funds, such as Forest highways, Park roads, etc., the HA will be the appropriate Federal or State highway agency.

f. *Human Environment*—the aggregate of all external conditions and influences (aesthetic, ecological, biological, cultural, social, economic, historical, etc.) that affect the life of a human.

* * *

ENVIRONMENTAL STATEMENTS—CONTENTS AND FORMAT

1. Environmental statements and combination environmental/Section 4(f) statements (draft and final) shall have a title page similar to the examples attached to this Appendix.

2. The following sections, as a minimum, are to be covered in environmental statements:

a. *A description of the proposed highway improvement and its surroundings.* The description should include the following type information: type of facility; length; termini; basic traffic data, including trips for the design year and anticipated new trips generated two years after completion of the highway section; right-of-way width (including existing ROW); lengths on existing and new location; major design features such as number of lanes,

access control, location of bridges and interchanges, etc.: a general description of the surrounding terrain, existing land use and proposed land use (a map preferable), and other existing environmental features; existing highway facilities including their deficiencies; the need for the proposal; the benefits to the State, region, and community; an estimate of when the proposal will be constructed; and the current status of the proposal with a brief historical resume. Inventory of economic factors such as employment, taxes, property values, etc., should be included as appropriate. The description should also include any involvement with Section 4(f) land (Paragraph 3 of this Appendix). A vicinity map(s) shall be furnished which will show the proposed highway section and its relationship to surrounding natural and cultural features such as towns, lakes, streams, mountains, historic sites, landmarks, institutions, developed areas, principal roads and highways and similar features that are pertinent to a highway study. Detailed maps, sketches, pictures, and other visual exhibits should be used to show specific environmental involvements as necessary. Maps and layouts of the proposed highway/Section 4(f) land involvement should be sufficiently detailed to give a layman reviewer a reasonable understanding of the highway impact and proposed measures to minimize harm.

b. *The probable impact of the proposed development or improvement.* The evaluation and discussion should specifically emphasize significant beneficial and detrimental environmental consequences upon the State or region or community, as appropriate, of building a new highway into or through an area, or modernizing the existing highway by upgrading and/or relocation.

(1) This section, for instance, would discuss and evaluate the broad impacts on the area or regain such as

the problems relating to anticipated increase in urbanization or the probable impact of displacing people (if these are significant elements of the highway proposal). Efforts to minimize impact should also be discussed in broad items. For example, measures necessary to insure proper rehousing should be discussed rather than evaluating specific number of people displaced by different alternatives and other differences of the alternatives. The significant environmental impacts of alternative locations and, as appropriate, designs, including a "do nothing" alternative is a proper subject for discussion under "Alternatives" paragraph 2d of this Appendix.

(2) Impacts upon the narrow band (i.e., about 1000 feet) adjacent to the highway may be included when significant to the whole of the region or community. However, the discussions under this section should address the probable significant impacts of the highway proposal (as opposed to individual alternative locations or designs) which might include the probable impact upon such elements, factors, and features listed in paragraph 3 of Appendix F.

c. *Any probable adverse environmental effects which cannot be avoided should the proposal be implemented* such as water or air pollution, effect upon Section 4(f) land, damage to life systems, urban congestion, threats to health or other consequences adverse to the environment identified under paragraph 2b of this Appendix. Adverse effects should include those which cannot be reduced in severity and those which can be reduced (but not eliminated) to an acceptable level unless the reductiion is a result of a different location in which case it should be included in the discussion of alternatives (paragraph 2d of this Appendix).

d. Alternatives: The locations and/or designs studied in detail by the HA are to be described (narratively and with maps and other visual aids, as necessary) and the probable beneficial and/or adverse effects of each alternate (including a do-nothing alternative) identified to the extent practicable consistent with the scale of the proposed highway improvement and significance of the impact. The exploration of alternatives should include an objective evaluation and analysis of estimated costs (social and transportation), engineering factors, transportation requirements, and environmental consequences. The description of alternatives will include information, as appropriate, similar to that suggested in Section A of this Appendix. The discussion of environmental impacts will include more detailed impacts for each alternative than the broad environmental consequences for the corridor identified in paragraphs 2b and 2c of this Appendix. The draft environmental statement should indicate that all alternatives are under consideration and that a specific alternative will be selected by the HA following the public hearing. The final environmental statement will be prepared for the selected alternative. Unless the final statement is included in the location study report (design report when prepared and circulated during design study), the final statement should include a brief discussion of the data supporting the se'ected alternative. This section should also include a discussion of alternatives to the use of Section 4(f) lands.

e. *The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.* The short-term uses should be evaluated (construction, changes in traffic patterns, the taking of natural features such as trees, etc., and man-made features such as homes, churches, etc.) as compared to the long-term effects (foreseen changes in

land use resulting from the highway improvement or other similarly related items that may either limit or expand land use, affect water, air, wildlife, etc., and other environmental factors).

f. *Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.* Highways require use of natural resources such as forest or agricultural land, however, these are generally not in sufficient quantity to be significant. The improved access and transportation afforded by a highway may generate other related actions that could reach major proportion and which would be difficult to rescind. An example would be a highway improvement which provides access to a nonaccessible area, acting as a catalyst for industrial, commercial, or residential development of the area.

g. Where unavoidable adverse environmental effects are encountered, planning and measures taken and proposed to minimize harm should be identified. These include procedural and standard measures which are required by standard specifications or standard operating procedures such as erosion control, stream pollution prevention, borrow pit screening or rehabilitation, fencing, relocation of people and businesses, land acquisition procedures, joint development, etc. Measures unique to a specific project should be discussed in detail. Examples of such would be depressing an urban highway to minimize audio and visual effects, providing buffer zones for esthetic purposes, replacement of parklands, etc.

h. *Final statements shall incorporate all comments received on the draft (including environmental comments contained in the public hearing transcript) along with a discussion of the comments and suggestions.* The HA shall describe its disposition of the comments and suggestions (e. g., revisions to the proposed development

or improvement to overcome anticipated problems or objections; reasons why specific comments and suggestions could not be accepted; factors of overriding importance prohibiting the incorporation of suggestions, etc.). This section may be added at the end of the review process in the final text of the environmental statement.

i. *Measures to minimize harm to Section 4(f) lands* should be included under a separate paragraph even though discussed elsewhere in the final statement.

j. Each copy of draft and final environmental statements should be accompanied by a summary sheet prescribed as attached to this Appendix.

3. The following information, when pertinent and available, should be included in the combination environmental/Section 4(f) statements. (See paragraphs 2a, 2c, 2d, and 2i of this Appendix.) To the extent practicable, this information should be included in the draft to initiate the necessary interagency review.

a. The description of the project (see paragraph 2a of this Appendix) shall include information about the Section 4(f) land in sufficient detail to permit those not acquainted with the project to have an understanding of the relationship the highway and park and the extent of the impact, such as:

(1) Size (acres or square feet) and location (maps or other exhibits such as photographs, slides, sketches, etc., as appropriate).

(2) Type (recreation, historic, etc.).

(3) Available activities (fishing, swimming, golf, etc.).

(4) Facilities existing and planned (description and location of ball diamonds, tennis courts, etc.).

(5) Usage (approximate number of users for each activity if such figures are available).

(6) Patronage (local regional, and national).

(7) Relationship to other similarly used lands in the vicinity.

(8) Access (both pedestrian and vehicular).

(9) Ownership (city, county, State, etc.).

(10) If applicable, deed restrictions or reversionary clauses.

(11) The determination of significance by the Federal, State, or local officials having jurisdiction of the Section 4(f) land.

(12) Unusual characteristics of the Section 4(f) land (flooding problems, terrain conditions, or other features that either reduce or enhance the value of portions of the area).

(13) Consistency of location, type of activity, and use of the Section 4(f) land with community goals, objectives, and land use planning.

(14) If applicable, prior use of State or Federal funds for acquisition or development of the Section 4(f) land.

b. A description of the manner in which the highway will affect the Section 4(f) land (include within paragraph 2c of this Appendix) such as:

(1) The location and amount of land (acres or square feet) to be used by the highway.

(2) A detailed map or drawing of sufficient scale to discern the essential elements of the highway/Section 4(f) land involvement.

(3) The facilities affected.

(4) The probable increase or decrease in physical effects on the Section 4(f) land users (noise, fumes, etc.).

(5) The effect upon pedestrian and vehicular access to the Section 4(f) land.

c. A specific statement (with supporting reasons) that there is no feasible and prudent alternative. (Include in discussion of alternatives, paragraph 2d of this Appendix.)

d. Information to demonstrate that all possible planning to minimize harm is or will be included in the highway proposal. (See paragraph 2i of this Appendix.) Such information should include:

(1) The agency responsible for furnishing the highway right-of-way.

(2) Provisions for compensating or replacing the Section 4(f) land and improvements thereon, including the status of any agreements. (Include agreed upon compensation, replacement acreages, and type land, etc., when known.)

(3) Highway design features developed to enhance the Section 4(f) land or to lessen or eliminate adverse effects (improving or restoring existing pedestrian or vehicular access, landscaping, esthetic treatment, etc.).

(4) Coordination of highway construction to permit orderly transition and continual usage of Section 4(f) land facilities (new facilities constructed and available for use prior to demolishing existing facilities, moving of facilities during off-season, etc.).

e. Evidence that the provisions of Section 470(f) of 16 U.S.C. (Section 106 of the Historic Preservation Act of 1966) have been satisfied when National Register Properties are involved.

SUGGESTED FORMAT—DRAFT STATEMENT

DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

Prepared by

.....

(Appropriate Highway Agency)

DRAFT

.....

(Environmental Statement of Environmental/Section 4(f) Statement)

ADMINISTRATIVE ACTION

for

.....

(Brief Description of Highway Improvement: Route, Termini, County, City, etc.)

THIS HIGHWAY IMPROVEMENT IS PROPOSED FOR FUNDING UNDER TITLE 23, U.S.C. THIS STATEMENT FOR THE IMPROVEMENT WAS DEVELOPED IN CONSULTATION WITH THE FEDERAL HIGHWAY ADMINISTRATION AND IS SUBMITTED PURSUANT TO:

SECTION 102(2)(C)
PUBLIC LAW 91-190
and
(when applicable)
Section 4(f)
PUBLIC LAW 89-670

....

Date — Signature of Appropriate Highway Agency Official

CLEARED BY FHWA FOR CIRCULATION AND COMMENTS

....

Date — Signature of FHWA Reviewing Official